

# CHAPTER 1

## INTRODUCTION TO CASE ANALYSIS

### Mission Statement

**The Mission of the Department of Fair Employment and Housing is to protect the people of California from unlawful discrimination in employment, housing and public accommodations, and from the perpetration of acts of hate violence.**

#### **A. Meaning of “Case Analysis”**

"Case analysis" is the term commonly used to describe the process of gathering and evaluating evidence during the investigation of a pending complaint for the purpose of concluding whether such evidence is sufficient to establish that a violation of the Fair Employment and Housing Act (FEHA), Unruh Civil Rights Act (Unruh Act) and/or Ralph Civil Rights Act (Ralph Act) has occurred.

The law provides a framework of applicable rules and guidelines by which to analyze, evaluate, and measure the sufficiency of the available evidence. A complaint is said to “have merit” or “be meritorious” if, by a preponderance of credible, reliable evidence, a violation of the law is demonstrated, making a remedy appropriate. The analytical framework utilized by the Department of Fair Employment and Housing (DFEH) is akin to that utilized by the Fair Employment and Housing Commission (FEHC) and California courts.

#### **B. Importance of the Analytical Framework**

DFEH's investigative finding as to the merit of a complaint is critical to the fulfillment of its mission, i.e., to enforce the FEHA, Unruh and Ralph Acts. If it is determined at any stage of the investigation that the complaint lacks merit, the investigation is terminated, a “right-to-sue” letter is provided to the complainant,<sup>1</sup> and the file is closed. If a complaint is found to be meritorious, DFEH will strive to vindicate the public policies set forth in the FEHA through conciliation or litigation.

The system of case analysis detailed herein, along with the substantive principles of controlling law set forth in the subsequent Chapters, must be uniformly followed during the course of every investigation conducted by DFEH. The application of this uniform system ensures that every complaint filed with DFEH in its District Offices located throughout the State will be processed and analyzed in the same manner, thereby providing equal treatment to complainants and respondents

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<sup>1</sup> “Right-to-sue” letters are not issued related to housing complaints.

irrespective of which office receives and files the complaint or DFEH staff members are assigned to handle it. In other words, the case analysis system is designed to assure that the highest level of customer service is provided to all persons who interact with DFEH.

Although DFEH serves as California's civil rights enforcement agency, the *ultimate* power and authority to direct a respondent who has violated the FEHA to provide a remedy to the complainant is actually vested in the FEHC and California courts. Once DFEH concludes that a complaint has merit, it has no power to order the respondent(s) to provide a remedy to the complainant or refrain from violating the law in the future.

Rather, if conciliation efforts fail, the complaint is referred to DFEH's Legal Division for handling. DFEH's Staff Counsels then advocate before the FEHC or court for the purpose of securing a remedy. DFEH represents the State of California and prosecutes the case for the purpose of vindicating the public policies set forth in the FEHA, Unruh and Ralph Acts.<sup>2</sup> DFEH, the party bringing the case before the FEHC or Superior Court, bears the burden of proving that the law has been violated by the respondent(s).

When the case is litigated before the FEHC, an Administrative Law Judge presides, receives the evidence and issues a proposed decision, which is then considered by the full FEHC. The FEHC has several options: It can adopt the proposed decision without modification, in which case it becomes the FEHC's "Final Decision." Alternatively, it can modify the proposed decision or request that the Administrative Law Judge reconvene the hearing for the purpose of receiving additional evidence or giving the parties an opportunity to further argue a point of law or fact. Or it can reject the proposed decision in its entirety and prepare its own decision.

When DFEH litigates a case in the Superior Court of the State of California, DFEH is the plaintiff and the respondent(s) is referred to as the defendant(s).

That is yet another reason why the analytical approach set forth herein must be utilized at each and every stage of the complaint process. During conciliation efforts, DFEH attempts to achieve resolution by persuading the respondent that, if DFEH litigates the case, DFEH has a good faith belief that it can prevail because the FEHC or court will concur with DFEH's analysis of and conclusions drawn from the available evidence adduced during the investigation. This is appropriate and ethical, given that the analytical method set forth herein is *identical* to that

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<sup>2</sup> DFEH's Staff Counsels do not represent the individual complainant. Therefore, DFEH's Legal Division Staff Counsels do not have an attorney-client relationship with the complainant, but he/she may be represented in any case litigated by DFEH by the attorney of his/her choosing.

employed by the FEHC and courts. This increases the likelihood the respondent will agree to resolve<sup>3</sup> the complaint without resorting to litigation.

As stated above, since DFEH utilizes the same analytical framework as the FEHC and courts, if it determines at any stage of the process that the complaint lacks merit, it must be dismissed.

### **C. Role of the Trier of Fact**

The FEHC and California courts consider admissible oral and documentary evidence, as well as argument about the evidence, offered by both sides. The trier of fact applies the controlling law to the evidence presented and independently determines whether that evidence is sufficient to show that a violation of the law occurred. In other words, the FEHC's Administrative Law Judge,<sup>4</sup> a Superior Court judge<sup>5</sup> or a jury decides whether or not DFEH has proven that the law was violated and, therefore, a remedy should be awarded.

The trier of fact must rely upon two resources for guidance in analyzing the evidence:

1. The specific statute which was allegedly violated, as well as any regulations interpreting that statute; and
2. Prior decisions of the FEHC or courts interpreting the same statute.

Generally speaking, the trier of fact is bound by the language of the statute and any regulations interpreting it, and must reach a result consistent with similar earlier cases. Because the factual underpinning of every case is different, however, the trier of fact has considerable discretion in applying the law, consistent with binding legal precedents, common sense and basic justice and fairness.

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<sup>3</sup> Settlements are virtually always structured so that there is no admission of liability by the respondent which also makes resolution more attractive and advantageous to respondent than allowing the matter to proceed to litigation.

<sup>4</sup> An Administrative Law Judge presides at the hearing, evaluates the evidence, and drafts a proposed decision which is then reviewed by the entire Commission. The Commission has the option of adopting the decision as presented, rejecting it, or requesting that it be modified in some fashion. Additionally, the Commission can direct that the hearing be reconvened for the purpose of exploring a particular issue further through the introduction of additional evidence and/or further oral or written argument.

<sup>5</sup> If the case is appealed to a higher court such as a Court of Appeal or the California Supreme Court, the findings of the lower court are reviewed by a panel of justices.

## D. “Investigation” Defined

“Investigation” means “a searching inquiry for ascertaining facts; detailed or careful examination.” It is also defined as “an active effort to find out something.”<sup>6</sup>

Thus, DFEH’s investigation into a complaint of discrimination can be described, at the most basic level, as the process of gathering and analyzing tangible and intangible documents, objects, and information for the purpose of determining whether the allegations contained in the complaint are, more likely than not, accurate.

## E. Analytical Framework Defined

Simply put, the analytical framework is the system that DFEH employs for breaking the allegations contained in a complaint into component parts, analyzing them sequentially, and ultimately determining whether the complaint “has merit.”

At the heart of the analytical framework are four such components – “issues” or fundamental questions – about the important aspects of the complaint, each of which is explained in detail below.

The fundamental issues addressed in each and every investigation conducted by DFEH are:

1. Jurisdiction
2. The Prima Facie Case of Discrimination
3. Affirmative Defenses
4. Remedy

The issues relevant to a particular complaint are those points that are in question or those matters that are in dispute.<sup>7</sup> A matter is generally said to be “at issue” or “in dispute” when the respondent challenges the assertions set forth by the complainant.

For instance, as to the first disputed issue, jurisdiction, the complainant will contend that he/she properly filed his/her complaint with DFEH and, therefore, it has the power and authority to investigate the allegations contained in the complaint. The respondent may argue that DFEH does not have jurisdiction to

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<sup>6</sup> Dictionary.com. *Dictionary.com Unabridged* (v 1.1). Random House, Inc. <http://dictionary.reference.com/browse/investigation>.

<sup>7</sup> issue. Dictionary.com. *Dictionary.com Unabridged* (v 1.1). Random House, Inc. <http://dictionary.reference.com/browse/issue>.

proceed with its investigation. Normally, the disputed issue or question of jurisdiction must be resolved before moving on to consideration of the next issue, whether or not the prima facie elements of discrimination.<sup>8</sup>

With respect to *each* issue, a conclusion must be drawn and determination made as to whether or not the investigation should proceed to analysis of the next issue. *Only* if the investigation reveals that it is more likely than not that the allegations set forth in the complaint are accurate *as to each of the four issues* will a complaint be said to have “merit” or “be meritorious.”

Each issue may or may not be disputed by the respondent. For example, a respondent may concede that DFEH has jurisdiction to investigate the complaint, but deny that the requisite elements of the prima facie case can be shown to exist, i.e., that it engaged in any act constituting discrimination.

## **F. Jurisdiction: Threshold Determination**

Before analyzing any other aspect of a complaint, it must first be established that DFEH has jurisdiction to proceed with its investigation into the allegations set forth therein for the purpose of determining whether the complaint has merit.

“Jurisdiction” is the term used to describe DFEH’s power, authority or authorization to proceed with its investigation.<sup>9</sup> If DFEH does not have jurisdiction over the complaint, it has *no* authority to investigate, conciliate or litigate the case, thus, the complaint must be dismissed and the file closed.

There are two basic jurisdictional aspects that must be analyzed:

### **1. Procedural**

It must be determined, for instance, whether the complaint was timely filed within the applicable statute of limitation,<sup>10</sup> properly verified, and timely served upon the respondent in accordance with DFEH guidelines.<sup>11</sup>

### **2. Subject Matter**

In order for DFEH to have jurisdiction, the acts and events alleged must constitute a violation of the specific provisions of the FEHA, Unruh and/or Ralph Acts.

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<sup>8</sup> There may be instances when jurisdiction is disputed and it is appropriate, due to time constraints or other considerations, to continue gathering evidence pending a final jurisdictional determination from DFEH’s Legal Division.

<sup>9</sup> DFEH exists and operates by virtue of the provisions of the FEHA, Unruh and Ralph Acts.

<sup>10</sup> See also DFEH Enforcement Division Directive Number 203.

<sup>11</sup> See also DFEH Enforcement Division Directive Number 233.

Moreover, the respondent(s) must be covered under and, therefore, bound to comply with the laws DFEH is empowered to enforce.

A detailed discussion of all factors relevant to a determination of whether DFEH has jurisdiction over the complaint is set forth in the Chapter entitled "Jurisdiction."

## **G. Prima Facie Case of Discrimination**

The evidence collected during DFEH's investigation must be evaluated to determine whether it is sufficient to establish a prima facie case. The term "prima facie" is Latin, meaning "at first look" or "on its face." Under the law, the presentation of prima facie evidence of a particular fact is considered sufficient to establish the existence or truth of that fact.<sup>12</sup> Stated differently, DFEH must decide if there is enough competent evidence to prove the existence of each and every element of the prima facie case. The exact amount of evidence required to make the prima facie case varies, depending upon the claimed basis for the violation of the law.

The elements of the prima facie case are *specific to the type of allegations being investigated*. In other words, when deciding whether or not a prima facie showing has been made, the investigator must refer to the elements for the specific type of complaint in question and determine, as to each and every element, whether the evidence proves each element. The prima facie elements are set forth in the Chapters devoted to each specific type of complaint DFEH receives and investigates.

In general terms, the prima facie elements of a specific type of complaint include three components:

1. The complainant must be a member of at least one of the protected classes enumerated in the FEHA.
2. The complainant must have been subjected by the respondent to conduct prohibited by the FEHA.
3. There must be a demonstrable causal connection between the complainant's membership in the protected class and the wrongful conduct to which he/she was subjected.

*Example: The prima facie elements of a complaint alleging discrimination because of a complainant's physical disability are:*

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<sup>12</sup> The opposing party has an opportunity to rebut the prima facie showing by introducing contradictory evidence.

- a. *The complainant is a person with a physical disability as that term is defined in Government Code section 12926, subdivision (k).*
- b. *The respondent denied the complainant an employment opportunity, i.e., took an “adverse action” against the complainant by refusing to hire him/her, terminating his/her employment, etc.*
- c. *A “causal connection” exists between the complainant’s physical disability and the denial of an employment opportunity. In other words, the decision was based, at least in part, upon the complainant’s disability.*

In the above example, the existence of each of the three distinct components must be established in order to make a prima facie showing that the respondent engaged in unlawful discrimination because of the complainant’s physical disability. In other words, there are three prima facie elements of the case “at issue.” The elements at issue can be phrased as fundamental questions about those important elements of the case and, in fact, in order to aid DFEH staff, are presented in that fashion in the Analytical Outline and Explanation of Analytic Outline included with each Chapter devoted to a substantive area of the law.

As mentioned above, the complainant and respondent will most often provide opposing and contradictory answers to some or all of those questions, giving rise to the controversy under investigation by DFEH. However, in some instances, the respondent may stipulate to the existence of one or more of the prima facie elements. For instance, in the example above, the respondent might stipulate that the complainant is a person with a physical disability, but deny the remaining two prima facie elements. DFEH’s investigation will then continue so that a determination can be made as to whether the complainant’s or respondent’s position is accurate as to the two remaining elements.

It is important to note that, as to some types of complaints, the second element at issue, the question of whether the respondent engaged in unlawful discrimination, may involve an allegation that a workplace policy implemented by the respondent resulted in an *adverse impact* upon the complainant. In such cases, the respondent’s motivation is not relevant (see detailed discussion in the Chapter entitled “Adverse Impact”.) Or the prohibited act(s) alleged may be, for example, retaliation, rather than discrimination.

In most cases, however, in order to conclude that a complaint is meritorious, there must be a “causal connection” demonstrated through the introduction of either direct or circumstantial evidence.

The specific prima facie showing required for each type of case investigated by DFEH is explained in detail in each corresponding Chapter of this Manual.

## H. Affirmative Defenses

Even if the prima facie elements of a case are proven, the respondent may still legally excuse its discriminatory actions if it can prove the existence and applicability of at least one affirmative defense recognized by the law.<sup>13</sup> During both the investigative and litigation phases, the burden to produce sufficient evidence to demonstrate the applicability of the affirmative defense(s) is *always* upon the respondent. In other words, the respondent always bears the “burden of proof” with respect to the viability of any affirmative defense asserted.

There is no viable affirmative defense to some types of prohibited conduct because there is no circumstance under which the type of behavior alleged can be legally excused or justified. For example, there is no affirmative defense to a claim that workplace sexual harassment occurred. Since no affirmative defense is available, the respondent may assert that the behavior complained of did not occur or that the prohibited acts did take place but have no legal consequence, i.e., the respondent cannot be held liable. In the case of harassment by a co-worker or third party, the respondent may argue that it neither knew nor should have known of the harassment and when it did become aware of the behavior, took immediate and appropriate corrective action, in addition to steps to assure no future occurrences. (See detailed discussion in the Chapter entitled “Sexual Harassment.”)

## I. Discrimination Shown by “a Factor” in the Decision-Making Process

With regard to establishing the causal connection between the complainant's membership in a protected class and an adverse employment action taken against the complainant, the evidence need not show that the complainant's status was the *sole* or even dominant motivation for the employment decision.

Rather, discrimination is established if a preponderance of the evidence indicates that the complainant's membership in a protected class was *one* (or more) of the factors that motivated the employer's action.<sup>14</sup> Therefore, it is possible for the respondent to articulate legitimate, nondiscriminatory reasons for its employment decision but still be found to have engaged in unlawful discrimination if, *in addition to those nondiscriminatory reasons*, just *one* of the motivating factors was the complainant's status as a person entitled to protection under the FEHA.

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<sup>13</sup> “If employment discrimination is established, this employment discrimination is nonetheless lawful where a proper, relevant affirmative defense is proved and less discriminatory alternatives are not shown to be available.” (Cal. Code Regs., tit. 2, § 7286.7, subd. (a).)

<sup>14</sup> *DFEH v. Seaway Semiconductor, Inc.* (2000) FEHC Dec. No. 00-03, at p. 11; *DFEH v. General Dynamics, Inc.* (1990) FEHC Dec. No. 90-06, at p. 8; *Watson v. Department of Rehabilitation* (1989) 212 Cal.App.3d 1271, 1290; *DFEH v. Raytheon Company* (1989) FEHC Dec. No. 89-09, at pp. 15-16, *decision affd.*, *Raytheon Co. v. Fair Employment and Housing Commission* (1989) 212 Cal.App.3d 1242.



## J. Remedies

After concluding that the evidence adduced demonstrates that the law has been violated, the final step in the process of case analysis is formulating an appropriate remedy for the complainant and/or the State of California.

A finding that the law has been violated does not, in most instances, automatically grant entitlement to a remedy. In order for most types of remedies to be awarded, the law also requires proof that a specific injury resulted from the violation, as well as the need for that specific type of remedy in order to compensate for the injury suffered. Thus, as part of the investigative process, it is necessary to ascertain whether such proof exists.

DFEH's interest in obtaining an appropriate remedy goes beyond the complainant's particularized interest in the case. Thus, some remedies are designed to vindicate the State of California's interest in eradicating and preventing discrimination and harassment, thereby fulfilling DFEH's mission. So, for example, as a term and condition of settlement, DFEH will require the respondent to agree to refrain from engaging in specific conduct that constitutes a violation of the FEHA. If the case proceeds to a hearing before the FEHC or a Superior Court trial, DFEH will request that the respondent be ordered to refrain from such conduct.

*Example: A complainant alleges that, in order to secure a job with the respondent employer, he was required to complete an application form that included prohibited medical inquiries. The complainant further contends that, during the subsequent job interview, he was asked by a representative of the respondent if he had "any disabilities of any kind that [the respondent] needs to know about." As a condition of resolving the complaint without the need for litigation, DFEH may require that the respondent employer cease utilizing the job application form complained about, implement and use an application form which does not violate the FEHA, and ensure that all of its representatives who conduct job interviews are trained as to what inquiries are and are not appropriate under the FEHA. Alternatively, if the case proceeds to a hearing or trial, DFEH may, after it establishes to the satisfaction of the trier of fact that the allegations contained in the complaint have merit, ask that the respondent be ordered to do those things.*

For a detailed discussion of the legal standards governing the remedies available for various kinds of injuries and the associated proof requirements, see the Chapter entitled "Remedies."

## K. Evidence

### 1. Forms of Evidence

Generally, evidence is defined as something tangible that establishes the existence of a fact or state of facts. In other words, the evidence has probative value.

Evidence generally takes two forms, oral or documentary.

#### a. Oral

Oral evidence consists of statements made or testimony offered by persons who have personal knowledge about the facts in dispute.

The general rule is that oral statements must be fact-based and not include any speculation or opinion.

Expert opinions, discussed in detail below, are almost always offered verbally and, because of the expert's specialized knowledge and skill, constitute the exception to the general rule prohibiting statements of opinion.

*Example: The complainant contends that he applied for, but did not receive, a promotion because of his national origin. During the course of DFEH's investigation, the complainant's co-worker is interviewed. The co-worker supports the complainant's allegations because the complainant was the most qualified candidate for the position in question, remarking, "Nobody could be more qualified than [the complainant]." The interview reveals that the co-worker never reviewed the resumes or applications submitted by the other promotional candidates, and has no knowledge of their identity, work experience, educational background or job performance history. He did not participate in interviews conducted for the purpose of selecting which candidate would be promoted.*

*The co-worker's statement is purely a speculative, nonexpert opinion lacking foundation. The co-worker has no personal knowledge about the issue for which the statement was offered, i.e., the complainant's qualifications as compared with those of the other candidates for promotion. It has no probative value.*

*Example: The complainant contends that he was subjected by his employer to retaliation for having filed a complaint with his employer's Equal Employment Opportunity (EEO) Officer. Specifically, he alleges that he was subjected to discrimination*

*because of his race and, shortly thereafter, reassigned to an undesirable shift. During the investigative interview, the EEO Officer states that she was present when the manager who made the decision to transfer the complainant used a racial epithet to describe him.*

*The EEO Officer has personal knowledge of the facts given that she was present when the manager used the racial epithet. Her statement is based upon her personal knowledge of the disputed facts and has probative value.*

**b. Documentary**

Documentary evidence is a catchall term used to describe evidence in any form other than oral witness statements or testimony. Most often, the evidence is comprised of written materials, but documentary evidence can be *any* tangible thing.

Examples of documentary evidence that can be relevant, material, reliable and have probative value in determining whether a complaint has merit include, but are not limited to, records maintained in the ordinary course of business such as:

- Medical records
- Job applications
- Resumes
- Payroll records
- Job performance reviews or evaluations
- Workplace policies
- Workplace complaint procedures
- The contents of an official “personnel file”
- The contents of a “supervisor’s file”
- Memoranda
- Correspondence, including e-mail messages
- Electronic databases including calendaring and mail programs (e.g., Outlook, Outlook Express, Thunderbird, GMail) or spreadsheet programs (e.g., Excel, Lotus, Peachtree)
- Media such as videotape, computer disks, CDs or DVDs containing relevant information

Documentary evidence may also be comprised of documents created and submitted by the complainant, including but not limited to diaries, journals or chronologies, cards and letters, including e-mail messages.

Documentary evidence may also take the form of objects.

Example: A female complainant claims that she was subjected to workplace sexual harassment by her immediate supervisor. She alleges that he not only made verbal statements to her, but bestowed unsolicited and unwanted gifts, cards and letters upon her by leaving them on her desk before she arrived at or after she left work. Specifically, she states that he left signed love letters and greeting cards, books bearing inscriptions, music CDs, movies on DVDs, jewelry, and scented candles for her. He also arranged for flowers to be delivered to her. She kept the enclosed gift cards and photographed the flowers before they wilted and died.

All of the objects in question, including the photograph of the flowers, should be collected by DFEH and safeguarded during its investigation into her complaint as those items may be introduced as evidence if the case proceeds to a hearing before the FEHC or trial in the Superior Court.

## **2. Types of Evidence**

### **a. Direct**

Evidence is direct if it allows a conclusion to be made about the factual issue in dispute without using the process of inference.

Example: A male complainant contends that he was not hired for a specific job because of his sex (gender.) During the investigation, the following evidence is discovered: Another applicant heard a member of the respondent employer's management staff who was responsible for hiring decisions make an unlawful statement of preference: "I am not going to consider or hire any man for this job."

The statement of preference is direct evidence of the speaker's mindset – bias or prejudice toward one gender (male.) It demonstrates that the complainant's membership in the protected class (males) was at least one factor in the decision not to hire him.

### **b. Circumstantial**

Evidence is circumstantial, or indirect, if it allows a conclusion to be made as to the factual issue in dispute only through the process of inference.

Example: A male complainant is qualified and applies for a particular job, but is not hired. He contends that a "less qualified"<sup>15</sup>

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<sup>15</sup> "Less qualified" is a term frequently used by complainants which cannot be taken "at face

*female applicant was selected and, therefore, he was subjected to discrimination because of his sex (gender.) Analysis of the two candidates' qualifications reveals that the female applicant had less relevant work experience, less education, and inferior performance evaluations as compared to the complainant. That evidence gives rise to a rebuttable inference that the female candidate was hired by the decision-maker as the result of an unlawful bias or prejudice against male candidates or preference for female candidates.*

Example: *The complainant states that she has been employed by the respondent for nine years, during which she has received raises, promotions and commendations, and has never been subjected to discipline of any kind. She claims that in all of her performance evaluations, she has been consistently rated "excellent" or "superior" by her supervisors, and she has never been subjected to discipline of any kind.*

*She further alleges that she was subjected to sexual harassment by her immediate supervisor, as a result of which she filed an internal complaint with her employer six months ago. Shortly after filing the complaint, she received a performance evaluation that reflected "improvement needed" in several areas. Last week, she was demoted when her employer claimed that her performance had not improved in accordance with the expectations outlined in the latest written performance review.*

*The complainant believes that she has been subjected to retaliation for filing an internal complaint alleging sexual harassment. Her allegations of harassment were substantiated during the employer's investigation and her former supervisor's employment terminated shortly thereafter.*

*Assuming the accuracy of the complainant's assertions regarding her employment history,<sup>16</sup> her receipt of a negative performance review and eventual demotion may be circumstantial evidence of the respondent's desire to subject her to retaliatory conduct as inferred from the timing of the adverse employment actions (negative performance review and demotion.) The proper inquiry is whether the circumstantial evidence, i.e., the close proximity in time of the events in question, is "consequential" (material) such that the available evidence shows it is more probable than not that the*

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value." The investigation must include an objective comparison of all candidates' backgrounds, including but not limited to their educational accomplishments, relevant work experience, performance history, etc.

<sup>16</sup> The details about the complainant's employment history must be substantiated during the course of DFEH's investigation.

*respondent's actions were motivated by a desire to retaliate against the complainant for having complained about workplace harassment.*

**c. Statistical**

Statistical evidence may demonstrate that a workplace policy or practice has an adverse impact upon members of a protected class or support an inference that discrimination has occurred.

*Example:* *The respondent requires employees seeking advancement to pass a promotional examination and achieve a score of 75 or higher. 100 employees take the examination: 43 men and 57 women. 98% of the men attain a score of 75 or higher, but only 72% of the women attain a passing score. The statistical evidence may demonstrate that the promotional examination adversely impacts women.*

In the above example, the evidence may demonstrate that the promotional examination has a disproportionately adverse impact upon women that is statistically significant. The focus of the investigation should include an evaluation of the substantive content of the examination to determine the test's validity. (See further discussion in the Chapter entitled "Adverse Impact.")

Statistical evidence may also be used to establish an inference of discrimination in disparate treatment cases.

*Example:* *A review of the respondent's hiring statistics for the past five years shows that 82% of new hires were Caucasian/white, 10% were African-American, and 8% were Asian. The hiring manager remarks to his assistant that he would rather not hire "minorities." The respondent's hiring statistics may be compared with the racial composition of the population in the geographic locale from which employees are recruited and hired for the purpose of determining whether a disproportionate number of Caucasian/white individuals have been hired.*

*The manager's statement, bolstered by the relevant statistical evidence, may support a finding of discriminatory animus toward non-Caucasian job applicants. The evidence may show that the respondent subjected an African-American applicant to disparate treatment by not selecting him/her for a job.*

### 3. Relevance

Evidence is relevant if it tends to prove or disprove the existence or nonexistence of a fact that is connected or pertinent to the issue being analyzed. Stated differently, relevant evidence logically tends to prove that one or the other of two opposing answers to a question is correct.

*Example: In order to properly investigate a claim that a complainant was not hired for a specific job because of his/her membership in a protected class, evidence must be gathered and evaluated to determine the answer to this question: Did the respondent deny the complainant an employment opportunity, i.e., take an “adverse action” against him/her by failing to hire him/her?*

*Relevant evidence gathered during the investigation will provide the answer to that question. It will either support a conclusion that the denial occurred or be deemed insufficient to support such a conclusion. If, in fact, the evidence shows that the denial occurred, the investigation will proceed to an evaluation of whether the denial was causally connected to the complainant’s membership in the protected class.*

The definition of “relevance” demonstrates the importance of using the analytical framework set forth herein to conduct investigations, i.e., analyzing the evidence related to each element of the prima facie case, as well as any applicable affirmative defense(s). Relevant evidence supports a conclusion that the existence of a fact or truth of an allegation is more probable than not. Probability is determined using common sense and commonplace human experience – a logical connection between a proposed answer to the legal question posed and the evidence supporting that answer.

Evidence is relevant if it is “consequential” under the law. In other words, evidence is only relevant if it supports a disputed fact/allegation that has legal consequences. Sometimes it is said that the evidence is *material* because it has a legal connection to the issue being examined.

In the example above, evidence demonstrating that the respondent denied an employment opportunity to the complainant is relevant since fact is material to the issue being resolved and has legal consequences. The respondent will be held liable for that and be required to provide a remedy to the complainant and/or DFEH if the requisite causal connection between that denial and the complainant’s membership in a protected class is also shown.

### 4. Corroboration

Evidence is corroborated when it is confirmed, verified or authenticated by consistent additional evidence.

Corroborating evidence can take two forms: Direct or indirect (contemporaneous).

**a. Direct Corroboration**

Direct corroboration of an asserted fact or allegation may come from a witness who saw all or part of the event in question, or some or all of the details of the incident.

Alternatively, the witness may not have seen the actual event but may be able to verify a person's presence in a specific location at a particular time where the alleged incident took place.

*Example: A female employee complained that her male co-worker engaged in a pattern of sexually harassing behavior that made her work environment hostile. She stated that on one occasion, she was seated at a table speaking with a female co-worker who was sitting directly across from her. The male co-worker, standing to her left, reached behind her with his right hand and snapped the strap of her bra, causing her to become extremely upset. She lists the female co-worker as a corroborating witness.*

*When interviewed, the female co-worker recounted that she was seated across from the complainant on the day in question and recalled the harasser standing next to the complainant. She stated that, as the harasser walked away, the complainant suddenly looked shocked and burst into tears. The witness did not actually see the harasser touch the complainant, but she observed the complainant's emotional reaction and, as she attempted to console the complainant, recalls the complainant told her what the harasser had done just moments before.*

*The witness' statement is direct corroborating evidence of the incident in question. Even though the witness did not see the specific conduct in which the harasser engaged, she witnessed his presence in the location at the time set forth by the complainant.*

**b. Indirect (Contemporaneous) Corroboration**

Indirect or contemporaneous witnesses were not present when an event took place but were told about or otherwise learned of it soon after the incident. Alternatively, the witness may have seen the complaining party's reaction to the incident.



*Example: In the immediately preceding example involving the harasser who snapped the complainant's bra strap, the female co-worker is both a direct corroborating witness, as explained above, and an indirect corroborating witness.*

*She observed the complainant's reaction to the incident – shock and tears. She was also told by the complainant about the event immediately after it happened when she attempted to comfort the complainant, thereby providing valuable testimony about the impact of the harasser's conduct upon the complainant.*

## **5. Credibility**

In order to make an investigative finding, it is usually necessary to interview witnesses and determine whether or not their statements are credible, i.e., believable. Evidence directed to a credibility determination is relevant because of its ultimate relationship to the resolution of the questions presented. In other words, such evidence is directly related to proving the existence or nonexistence of the elements of the prima facie case or viability of an affirmative defense.

In some cases, as discussed above, the respondent admits the allegations and credibility assessment is necessary.

Most of the time, however, it will be impossible to reconcile the complainant's allegations with the respondent's denial absent concluding that one of the parties is lying. In such cases, when there are no direct witnesses to the events alleged, the investigator's appraisal of the parties' credibility will provide the only basis for investigative conclusions. This process can be extremely difficult as investigative conclusions must be founded upon objective facts.

There are a number of factors that must be utilized to determine whether or not evidence is credible. Among the most critical, especially when evaluating witness testimony or statements, are:

### **a. Evasive or Deceptive Verbal Responses**

Posing specific investigative questions will reduce the possibility that a witness can provide evasive or noncommittal responses. One way to test a witness' truthfulness and candor is to repeat the same direct question for the purpose of seeing if the same response is received. The question can also be reworded but designed to elicit the same information.

Another technique is noticing the differences, if any, between the manner in which a witness answers questions that are pertinent to the issues being investigated and the way he/she answers questions dealing with mundane, tangential or less critical issues.

Additionally, answers such as “not really,” “I guess,” “I think,” “as far as I know,” “I wasn’t even there,” “Why would I do something like that?” or “It couldn’t have been me” are ambiguous. When such responses are received, the investigator should ask the question again – possibly after rewording it – and press the witness for a direct, unequivocal answer.

*Example: A female employee alleges that her male supervisor engaged in quid pro quo harassment by repeatedly asking her to go on a date with him and threatening to deny her a promotion if she did not accede to his demands. During the investigative interview, the supervisor was questioned as to whether he asked the employee out on a date. In response, he held up his left hand and pointed to the wedding ring on his third finger, stating, “I’m married.” In response to the follow-up question, “Did you or did you not ask your female subordinate out on a date?” the supervisor stated, “I wouldn’t do that.” After being asked a third time whether or not he invited his female employee out on a date, the supervisor responded, “Look, I said I’m married. Why would I do that? I’ve answered your question, so don’t ask me again.”*

*Based upon the supervisor’s evasive answers to a question directly relevant to one of the elements of the prima facie case, the investigator concluded that the supervisor was being evasive and attempting to hide the fact that he did, in fact, ask the female complainant to go on a date with him.<sup>17</sup>*

#### **b. Bias or Prejudice**

The probative value of otherwise relevant evidence can be weakened significantly or eradicated altogether by the revelation that the evidence, in whatever form, is tainted by the witness’ bias, prejudice or motivation to skew his/her testimony or statement to support a specific result, outcome or finding. Thus, when assessing the credibility of witness testimony or statements, the underlying motives of the witness must always be evaluated by considering factors including, but not limited to, the following:

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<sup>17</sup> See Amy Oppenheimer and Craig Pratt, *Investigating Workplace Harassment: How to Be Fair, Thorough, and Legal*, Chapter 8, Weighing the Evidence and Making a Decision, “Deceptive Verbal Responses,” pg. 113.

- 1) The witness' relationship to the complainant or respondent.

Are they related by blood or marriage?

If they are co-workers, how long have they worked together and what is their relationship like? For instance, do they socialize outside of the workplace?

Is there a supervisory or managerial relationship between the witness and complainant?

- 2) Do the witness and complainant belong to the same protected basis(es)? Do they have any other common characteristics (background, life experiences, etc.) that might motivate the witness to slant his/her testimony or be untruthful?
- 3) Do the witness and complainant share a connection to the respondent? Has the witness ever filed a complaint against the same respondent with his/her employer, DFEH, EEOC or any other agency or organization? Is there any history of conflict or controversy in the witness' past dealings with the respondent that would motivate him/her to slant his/her testimony or be untruthful?
- 4) What, if anything, does the witness stand to gain or lose by providing testimony of a particular nature?

Is the witness being subjected to intimidation, coercion or threats of any sort with regard to the substance of his/her testimony or statement?

### **c. Presentation Style**

It is critical to assess a witness' overall demeanor while providing a statement or testimony.

However, that assessment must always take into account cultural and/or religious customs or practices that may influence a witness' demeanor, dress or manner of speaking. For instance, cultural differences may affect the witness' willingness or ability to express anger or impact the witness' response to persons in positions of authority.

Things to observe and evaluate include, but are not limited to:

## **1) Eye Contact**

Does the witness maintain eye contact with the person asking him/her questions while providing answers?

The inability or unwillingness to maintain eye contact when making a statement or providing testimony may be a sign of evasiveness, defensiveness, lack of confidence in the information being imparted or outright dishonesty.

If the witness does not maintain eye contact, where is he/she looking before, while, and after providing answers to the questions posed? At a particular person (if someone else is in the room)? Make sure that there is no coaching of the witness taking place via the use of signals, gestures, etc.

If the witness does make eye contact, but it is unnaturally prolonged or focused, it may or may not be an indication of aggression, defensiveness or a desire for confrontation.

## **2) Speech Pattern**

Does the witness hesitate before beginning to speak or speak haltingly? Long pauses before providing a response may indicate that the witness is struggling to figure out how to answer the question. Delayed answers could also be a sign that the witness is having trouble remembering events, details, names or other information (see further discussion below). This may or may not be a sign of evasiveness, defensiveness, a lack of self-confidence or dishonesty.

## **3) Vocal Tone, Tenor, and Inflection**

It is important to consider a witness' vocal tone, tenor and inflection. Does he/she speak in a monotone style with no emotion or enthusiasm? Or does he/she speak in an unusually high-pitched, excited fashion that seems unusual or inappropriate to the circumstances? Does he/she appear to deliberately alter his/her normal speech pattern in an effort to be convincing? Or does he/she appear to be speaking in a natural, effortless manner? Are the witness' answers audible or is it necessary to strain to hear his/her words? Conversely, does the witness seem to be speaking in a loud or boisterous manner, or even shouting when providing responses to questions?

#### **4) Posture, Body Language, and Overall Demeanor**

Does any aspect of the witness' posture or body language suggest fearfulness? A lack of self-confidence? Defensiveness? Aggressiveness, anger and/or resentment at being called upon to provide a statement or give testimony?

Does the witness seem nervous? For instance, is he/she perspiring in a manner that is disproportionate to environmental factors? Is he/she fidgeting? Does he/she seem otherwise unable to remain still or calm? Does he/she wave his/her arms about in an emotional manner?

Does the witness seem relaxed, confident, at ease? Does he/she appear to have a very formal, unnatural or rigid posture or demeanor?

A shift in body language from an open to closed position when discussing key relevant or sensitive issues may indicate that the witness is uncomfortable discussing those topics and suggest evasiveness, lack of candor or untruthfulness.

#### **6. Authenticity**

Finally, evidence that is not reliable may not be relevant. Evidence is said to be reliable if it is trustworthy.

As to documentary evidence, it is critical to examine the item in question to assure that it is in its original condition and has not been altered in some fashion.

With regard to personnel files, it is a good idea to instruct the complainant to review his/her file as near the outset of the investigation as possible. California employees have a right to inspect their personnel file.<sup>18</sup> The complainant should prepare a list of all documents contained in his/her file, noting the date(s) reflected there, as well as the total number of pages that comprise each item. When a copy of the file is received from the respondent in response to an investigative request, the file must be inspected to ensure that no documents appear there that were not contained in the file at the time the complainant reviewed it, or that documents which were included at the time of the complainant's review are not omitted. Obtaining a copy of the complainant's personnel file and comparing its contents with the representations made by the parties concerning the complainant's

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<sup>18</sup> Lab. Code, § 1198.5.

employment history and performance is critical to a complete assessment of *both* the complainant's and respondent's credibility and veracity.

## **7. Standard of Proof: A Preponderance of the Evidence**

In order to make an investigative finding that the allegations set forth in a complaint have merit, it must be determined that the evidence is sufficient to demonstrate that a violation of the law occurred. The standard by which the sufficiency of the evidence is measured is "a preponderance." The term "preponderance" does *not* refer to the *quantity* of evidence gathered. Rather, it refers to the *weight* of the evidence and means that all of the evidence gathered, taken together, shows that the existence of the facts in dispute is more likely than the nonexistence of those facts. In other words, the evidence shows that, on the whole, it is more probable than not that a violation of the law occurred.

Sometimes the standard is described by visualizing the scales of justice. If the scale barely tips in favor of a finding that the allegations contained in the complaint are true, the complaint will be found to have merit. It is also sometimes described quantitatively as a 51% vs. 49% relationship between the competing available evidence or referred to as "strong" vs. "weak" evidence.

As noted above, the evaluation of the evidence must focus upon its *quality*, not *quantity*.

*Example: When investigating a complaint alleging that the complainant was not hired to fill a specific position because of his/her membership in a protected class, this question must be answered: Did the respondent deny the complainant an employment opportunity, i.e., take an "adverse action" against him/her by failing to hire him/her? The answer to the question will be "yes" if a preponderance of the evidence gathered shows that the denial occurred, i.e., the evidence demonstrates that it is more probable than not that the denial occurred. In order to reach a conclusion it will be necessary to evaluate the credibility of the evidence gathered. Only credible, i.e., believable, evidence can support a factual finding.*

## **8. Burden of Proof**

The law assigns the burden of proof to one side of the case or the other, depending upon the circumstances. The phrase "burden of proof" refers then to which party to the case, complainant or respondent, has the obligation to establish that a fact has been proven by a preponderance of the available competent evidence.

With regard to the prima facie elements of the case, DFEH's investigation cannot proceed absent evidence sufficient to demonstrate, by a preponderance, the existence of those elements. However, with regard to the existence of an affirmative defense, the respondent always bears the burden of proof.

## **9. Expert Opinion Evidence: Special Considerations**

Expert opinion evidence is offered by a witness who has specialized knowledge and skills pertaining to a particular topic. The expert is presumed, because of his/her education and experience, to have a superior ability to draw inferences and reach conclusions on questions which fall within the scope of his/her field of expertise.

Experts provide an explanation of and assist lay persons to understand the specialized technical or scientific facts pertaining to the unlawful acts alleged by a complainant. For example, an expert is usually employed in a particular field or industry and can facilitate an understanding of the manner in which specific tasks are performed, the qualifications or physical demands of a particular job, the limits on the complainant's major life activities due to physical or mental conditions, disorders, diseases, etc. Thus, professionals from whom documentary evidence and witness statements are commonly gathered during the course of DFEH investigations include, but are not limited to, physicians (general practitioners and specialists), licensed clinical social workers, marriage and family counselors, vocational and rehabilitation counselors, certified public accountants, economists and statisticians.

*Example: The complainant alleges that he was subjected to discrimination because of his mental disability (depression) and denied a reasonable accommodation by his employer. For several years, he has been treated by a psychiatrist who prescribes and monitors the medications that complainant takes on a daily basis.*

*Since the allegations pertain to the complainant's mental disability and need for reasonable accommodation, evidence obtained from an expert, complainant's treatment provider, will be critical to a determination of whether the elements of the prima facie case exist.*

*During the course of the investigation it will be necessary, at a minimum, to obtain and review the complainant's medical records and talk with his treatment provider to verify that the complainant is a person with a mental disability as that term is defined in the FEHA, and understand the manner in which complainant is limited in at least one major life activity. The treatment provider's records and commentary will also serve as the source of confirmation of his need for a reasonable accommodation in order to perform the essential functions of his position. The investigation*

*must further encompass an analysis of what information pertaining to those topics was in respondent's possession when the employment decision at issue was made: What information was imparted to the respondent by the treatment provider and vice versa? The nature, quality and substance of the interactive process, if any, will also need to be evaluated. (See detailed discussion in the Explanation of the Analytical Outline accompanying the Chapter entitled "Physical and Mental Disability and Medical Condition.")*

Like all other forms of evidence, expert opinion evidence must be relevant to the issue(s) presented and carefully scrutinized to assure that the expert is free from any bias or prejudice.

The factors discussed above relative to lay witnesses, particularly considering bias or prejudice, are also applicable to evaluating expert witness testimony. For instance, it is common for two experts to provide extremely divergent opinions on the same question. When conducting an investigation, opposing expert opinions must be evaluated for the purpose of determining which expert's opinion is more credible and plausible. In addition to the above factors, consider the following:

- a. Confidence: Does the expert offer his/her opinion in a direct, confident manner, speaking to the point without hesitating or "waffling?" Does he/she become defensive or agitated when questioned about another expert's opinion which is different from his/hers or is he/she capable of articulating the reasons why the other expert's opinion is flawed in a clam, self-assured fashion?
- b. Consistency: Are the expert's writings consistent with his/her verbal explanation of his/her opinion? If there is any disagreement or inconsistency between the two, that should be pointed out to the expert and explored through careful questioning.
- c. Comprehensible: A believable expert witness should be able to state his/her conclusions using commonly understood words and phrases. To the extent that he/she must use technical words or phrases to convey his/her opinion, evaluate whether or not he/she is able to explain them in a manner which allows a lay person to readily understand what his/her conclusions are and how he/she reached those conclusions.
- d. Receptiveness to clarifying questions: An expert witness should be willing to restate his/her opinion and conclusions in response to questions designed to clarify and assure understanding.



## **L. Multiple Claims and/or Affirmative Defenses**

The complainant may allege multiple protected bases for the alleged unlawful conduct. For example, he/she may contend that he/she was subjected to workplace harassment because of his/her race, sex, and age. Moreover, the complainant may contend that he/she was subjected to more than one kind of adverse action or that the same type of adverse action was taken against him/her on more than one occasion. For example, he/she may have been denied a promotion on one or several occasions prior to being dismissed from his/her position.

Likewise, the respondent may assert more than one affirmative defense, even though it only need demonstrate the applicability of one defense in order to defeat a claim.

The investigative analytical outline is applied in *precisely* the same manner, described above, to the analysis of multiple claims or defenses, but incorporates, of necessity, relevant questions pertaining to *each* such claim or defense. The same standard of proof is applicable, i.e., a preponderance of the evidence, and the evidence gathered is evaluated under the same guidelines.

It is possible that the evidence gathered relative to each claim or defense will be deemed sufficient to support none, just one or more asserted claims but not those remaining. Likewise, the evidence may show the viability of none, one or more than one of the affirmative defenses asserted.

## **M. Investigative Findings**

### **1. Use of the Analytical Outlines**

An Analytical Outline is provided following each Chapter focusing on substantive areas of the law. Set forth therein are relevant questions to be asked and examples of evidence to be gathered during the course of the investigation. The questions and suggested investigative tasks set forth in each Analytical Outline are designed to elicit the information necessary for a determination of whether the *prima facie* elements exist, any affirmative defense is applicable and whether a remedy should be devised.

Each such list is illustrative, *not* dispositive, having been devised to serve as an analytical starting point. Because every case is unique, it may not be necessary to ask each and every relevant question listed. Some of the questions may be used verbatim, while some may need to be modified in consideration of the specific allegations of the complaint. There may be additional questions that must be asked or further evidence that must be gathered in order to thoroughly investigate the particular complaint in question. Because the alleged factual underpinning of each and every

complaint is different, it would be impossible to list every conceivable question to be asked or item of evidence to be collected in conjunction with the investigation of every potential complaint for the purpose of ascertaining whether such complaint has merit.

## **2. Scope of the Investigation/Amount of Evidence to Gather**

Investigators frequently wonder at what point they have gathered sufficient evidence to make a reliable determination as to each issue in dispute. Again, there is no hard and fast or rote formula that may be applied for the purpose of determining when all necessary investigative tasks have been completed. Rather, the standard to be used is this: the investigative findings in each case must reflect a balance of the importance of the evidence to a determination of whether the complaint has merit with the availability/accessibility of that evidence and the impact of obtaining it upon DFEH's limited resources.

Stated differently, the investigator, as he/she organizes, reviews and analyzes the evidence, must decide whether he/she has gathered sufficient information to make a determination as to each issue in dispute. If not, and the evidence can be obtained, the investigation cannot conclude. Information that might have some bearing on or affect the investigative findings must be gathered. There may be additional witnesses to interview, additional follow-up questions to be asked of witnesses already interviewed, or additional documents or other tangible things to be collected. With respect to any missing information, these questions must be answered: Will further investigation impact or clarify the findings already made? Why or why not?

## **3. Drawing Conclusions**

Correct Investigative conclusions may be readily apparent when the evidence gathered points overwhelmingly to only one conclusion.

However, in most instances, a conclusion is not quite that clear-cut and, as the saying goes, "reasonable minds differ." In other words, investigators, attorneys, juries and judges may reach varying conclusions about the strength of the evidence adduced.

There is no hard-and-fast formula or inflexible guideline to be utilized in formulating investigative determinations. Rather, the conclusion must be informed by application of the applicable law and legal precedents (decisions by the FEHC and courts) to the specific facts of the case, prior investigations of complaints with similar factual and legal underpinnings, logic and common sense.

DFEH staff should consult with a DFEH Legal Division Staff Counsel to obtain assistance when having difficulty determining whether additional investigative tasks should be performed and/or drawing conclusions from the evidence already adduced.

## **N. Application of the Analytical Framework**

### **1. Example Number One: Denial of Selection Because of Physical Disability and Perceived Disability**

*Complainant Mary Jones (Mary) comes to the District Office for her intake appointment and during the interview recounts that she applied for a job as a Secretary with respondent Widgetmaker Company, but was not hired.*

*Mary provides a letter that she received from Widgetmaker's Personnel Manager a few days after her job interview. The letter states:*

*Dear Ms. Jones:*

*Thank you for your interest in a position with Widgetmaker Company. We received applications from many qualified candidates and are sorry to inform you that you were not selected for the position of Secretary. We will maintain your application on file for a period of one year in the event that another opening arises.*

*Your application was rejected because you revealed during your interview that you suffer from a heart condition. Although we are certain that you possess the skills to perform the job, we selected another candidate because we would not want the stress associated with the position of Secretary to aggravate your condition and endanger your health. Therefore, we will not reconsider you for the position of Secretary, but, as noted above, will keep your application on file and consider you for less stressful jobs.*

*The complainant tells you that she did reveal during her job interview at Widgetmaker that she has a heart condition. She was recently diagnosed with aortic regurgitation, a condition where blood leaks back through the aortic valve into the left ventricle of the heart. Her physician has advised her that she may eventually need surgery to correct the condition but, in the meantime, she is being treated with medication. Mary has no work restrictions and, in response to your questions, indicates that she can perform all of the essential functions of the position of Secretary without a reasonable accommodation. She states that she only mentioned her condition during the interview in order to notify her potential employer that she would have to take time off work approximately four times per year to attend follow-up appointments with her physician.*

*Based on the above information, you accept the complaint for filing. The complaint alleges discrimination on the basis of physical disability and perceived physical disability, as well as failure to engage in the interactive process and provide reasonable accommodation.*

*In response to the complaint, respondent Widgetmaker states that it employs 25 persons and does not dispute that the complainant is a person with a physical disability. It also admits that its management employees perceived her as a person with a physical disability and treated her accordingly. Widgetmaker further admits that it declined to offer Mary the position of Secretary even though she was the most qualified candidate, but claims that its actions were lawful because Widgetmaker believed that allowing Mary to perform the job of Secretary would put her health in danger.*

*The complainant found another job four months after Widgetmaker rejected her, which she thoroughly enjoys, so she advises you that she has no interest in working for respondent Widgetmaker now. However, she does want back pay for the four months she remained unemployed but contends that she could have been working for Widgetmaker. Additionally, she tells you that she has filed her complaint with DFEH because "This whole situation was very upsetting to me and I don't want Widgetmaker to ever treat anyone else the way they treated me. I want you to see to that."*

**a. Determine if the Complaint is Within DFEH's Jurisdiction**

It must first be established that DFEH has jurisdiction to accept and investigate the complaint.

Does the respondent(s) dispute that DFEH has jurisdiction? If so, it is important to analyze the bases for the respondent's contention and analyze its argument(s) carefully to determine whether or not they have any merit.

**1) Procedural Issues/Questions:**

As to all complaints, the applicable statute of limitations must be ascertained and a determination made as to whether the complaint was timely filed. Other required inquiries include, but are not limited to, whether or not the complaint was properly served upon the respondent within the statutory timeframe.

**2) Subject Matter Issues/Questions:**

Is respondent Widgetmaker a California employer with five or more employees? Does the complaint encompass conduct and events

that constitute a violation of the FEHA, Unruh or Ralph Acts? In other words, is the behavior complained of encompassed by the laws DFEH is empowered to enforce?

The investigation can only proceed if DFEH has *both* procedural and subject matter jurisdiction over the complaint and parties.

**b. Elements of the Prima Facie Case of Discrimination**

Since the complaint alleges discrimination on the basis of physical disability or perceived physical disability, the Analytical Outline contained in the Chapter entitled “Physical or Mental Disability or Medical Condition” should be referenced. Set forth there are the elements of the prima facie case which must be established in order for the complaint to be deemed meritorious.<sup>19</sup>

As to this hypothetical case, the prima facie elements are:

- 1) The complainant is a person with a physical disability as that term is defined in Government Code section 12926, subdivision (k).
- 2) Alternatively, the complainant was perceived by the respondent to be a person with a physical disability as that term is defined in the FEHA.
- 3) The respondent denied the complainant an employment opportunity, i.e., took an “adverse action” against the complainant by refusing to hire her.
- 4) A “causal connection” exists between the complainant’s physical disability and the denial of an employment opportunity. In other words, the decision was based, at least in part, upon the complainant’s disability.

The Explanation of the Analytical Outline details the type of oral and documentary evidence that should be gathered and analyzed as to each element of the prima facie case.

Also detailed therein are examples of relevant questions that should be asked and persons who should be interviewed. The examples provided

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<sup>19</sup> The analytical steps explained here are to be followed for each allegation of wrongful conduct. For the sake of brevity, only the analysis of the physical disability discrimination claim is explained in detail here. Investigation of the respondent’s claimed failures to engage in the interactive process and provide a reasonable accommodation would, of course, be completed using the same analytical framework.

are illustrative. The questions to be asked during the investigation must be tailored to the factual assertions set forth in the complaint. Moreover, there is no hard and fast number of questions that must be posed in order to complete a particular investigation. Rather, the formulation of questions designed to elicit evidence is a fluid process. The response received to a question posed will often reveal the need for a follow-up inquiry.

**1) Is the complainant a person with a physical disability as that term is defined in Government Code section 12926, subdivision (k)?**

**a) Is this element of the prima facie case in dispute?**

Respondent Widgetmaker may dispute one or more elements of the prima facie case or stipulate as to all prima facie elements, but assert an affirmative defense, arguing that the defense excuses its admittedly discriminatory behavior.

If respondent Widgetmaker stipulates that Mary is a person with a physical disability, the investigation may proceed with analysis of the next element of the prima facie case.

If not, as discussed in the Explanation to the Analytical Outline, the investigative tasks that should be completed include, but are not limited to, obtaining and reviewing Mary's medical records. If necessary, Mary's treating physician should be interviewed.

**b) Does the evidence gathered demonstrate the existence of this prima facie element?**

If the available relevant evidence does not support a conclusion that Mary is a person with a disability, the case must be closed because there can be no prima facie showing that a violation of the FEHA occurred. Stated differently, unless the evidence confirms that Mary is a person with a physical disability, she could not have been subjected to unlawful discrimination on that basis.

If the available relevant evidence does support a conclusion that Mary is a person with a disability, the analysis proceeds.

**2) Did the respondent deny the complainant an employment opportunity, i.e., take an “adverse action” against the complainant by refusing to hire her?**

**a) Is this element of the prima facie case in dispute?**

Respondent Widgetmaker may stipulate that it denied Mary an employment opportunity.

If so, the investigation may proceed with analysis of the next element of the prima facie case.

If respondent Widgetmaker disputes the existence of this prima facie element, the investigative tasks that must be completed include, but are not limited to: copies of all documents submitted to respondent Widgetmaker by Mary in conjunction with her application for employment must be obtained, including but not limited to her resume and job application form. The letter Mary provided during her initial interview should also be authenticated by respondent Widgetmaker.

**b) Does the evidence gathered demonstrate the existence of this prima facie element?**

If the available relevant evidence does not support a conclusion that Mary was denied an employment opportunity, the case must be closed because there can be no prima facie showing that a violation of the FEHA occurred. Stated differently, unless the evidence confirms that Mary was denied an employment opportunity or that respondent Widgetmaker took some form of adverse action against her, she was not subjected to unlawful discrimination.

If the investigation reveals that Mary was denied an employment opportunity, i.e., the evidence supports her allegation that respondent Widgetmaker refused to hire her, the analysis continues with an examination of the third and final prima facie element.

**3) Was there a “causal connection” between the complainant’s physical disability and the denial of an employment opportunity? In other words, was the decision not to hire Mary based, at least in part, upon the fact that she is a person with a physical disability?**

**a) Is this element of the prima facie case in dispute?**

Respondent Widgetmaker does not stipulate that it denied Mary an employment opportunity because it may plan to assert an affirmative defense justifying its action.

If so, the three elements of the prima facie case have been established and the analysis proceeds with a consideration of any affirmative defenses raised by respondent Widgetmaker.

If respondent disputes the existence of this prima facie element, i.e., denies the existence of a causal connection between Mary's status as a person with a physical disability and its act of denying an employment opportunity to her, the focus of the investigation must be the collection of evidence related to respondent motivation for denying an employment opportunity to Mary.

The relevant evidence that must be gathered and analyzed includes, but is not limited to identifying the decision-maker(s) who determined that Mary would not be hired; obtaining all documentation pertaining to the screening, interviewing and selection process for all candidates for the position, as well as the resumes and job applications received from all other applicants; the job description or duty statement for the position; and information about the person(s), if any, who have held the position for the past five years. The decision-maker(s) should be interviewed.

See the directly relevant questions set forth in the Analytical Outline accompanying the Chapter entitled "Physical and Mental Disability and Physical Condition."

**b) Does the evidence gathered demonstrate the existence of this prima facie element?**

If the available relevant evidence does not show the existence of a causal connection between Mary's physical disability and the fact that she was denied the position of Secretary, the case must be closed because there is insufficient evidence to establish that a violation of the FEHA occurred.

If the available relevant evidence shows the requisite causal connection between Mary's physical disability and the fact that she was denied the position of Secretary, the investigation



continues with an examination of any affirmative defenses asserted by respondent in defense of its hiring decision.

**c. Affirmative Defenses**

Once the prima facie case has been established, there must be a determination as to whether any legally recognized affirmative defense excuses respondent Widgetmaker's unlawful conduct.

In this hypothetical case, respondent Widgetmaker contends that it was justified in denying the employment opportunity, i.e., the position of Secretary, to the complainant because it believed that allowing her to perform the job would jeopardize her health.

Once again, the Analytical Outline that corresponds to the type of harm claimed should be referenced to determine which affirmative defense is being invoked by the respondent.<sup>20</sup> The Analytical Outline contained in the Chapter entitled "Physical or Mental Disability or Medical Condition" sets forth five defenses that are applicable to claims of disability discrimination:

- 1) Inability to Perform
- 2) Health or Safety of an Individual with a Disability
- 3) Health or Safety of Others
- 4) Bona Fide Occupational Qualification (BFOQ)
- 5) Otherwise Required by Law

Respondent Widgetmaker is asserting the second enumerated defense, health or safety of an individual with a disability. Therefore, in order for respondent to overcome the prima facie showing already made, it has the burden of demonstrating that:

- 1) The complainant's disability prevents her from performing the essential functions of the job in a manner which would not endanger her health or safety because the job poses an imminent and substantial degree of risk to the complainant; and
- 2) No reasonable accommodation exists that will make the danger to the complainant's own health or safety not

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<sup>20</sup> Note that, during the investigative stage, the respondent will probably not use the precise terminology employed by the courts in order to assert an affirmative defense. If the nature of the defense being relied upon by the respondent is unclear, it is the responsibility of DFEH Consultant conducting the investigation to request clarification from the respondent and/or seek assistance from a DFEH Legal Division Staff Counsel.

significantly greater than if an individual who does not have a physical disability performed the essential functions of the position in question.

The Explanation of the Analytical Outline details the type of oral and documentary evidence that must be gathered and analyzed in order to evaluate the viability of the affirmative defense. Also detailed therein are examples of relevant questions that should be asked and persons who should be interviewed.

The investigative tasks that should be completed include, but are not limited to:

- 1) Reviewing the job description, duty statement, job analysis and other relevant documents, if any, in order to gain an understanding of the essential functions of the position in question, as well as its specific physical requirements, if any.
- 2) Reviewing the complainant's medical records and determining whether her health care provider(s) agree that she would endanger her own health by performing the job of secretary and, if so, if he/she can quantify the degree of risk.
- 3) Reviewing the complainant's work history to see if she has held a similar position in the past and, if so, if she experienced any adverse physical effects. Does the complainant's health care provider, for instance, attribute complainant's medical condition to her performance of similar duties or tasks?
- 4) Ascertaining the basis for respondent's belief that the complainant would endanger her health by performing the job of Secretary. For instance, if the respondent bases its assertion on any medical or industrial studies, copies of the studies must be obtained and reviewed to determine whether those studies demonstrate that the complainant cannot perform the essential functions of the position of secretary without endangering her health.
- 5) Reviewing the manner in which the respondent applies its workplace standards, guidelines, and health and safety rules and regulations. Are they uniformly applied?

Note: Even if respondent produces sufficient evidence to establish the applicability of the first prong of the affirmative defense, i.e., that the complainant would be in identifiable, substantial, immediate and probable danger if she were to perform the job of Secretary, it also bears

the burden of demonstrating that no reasonable accommodation can be implemented that will alleviate the danger to complainant.

As set forth in the Explanation of Analytical Outline included in the Chapter entitled "Physical or Mental Disability or Medical Condition," the focus of the investigation must now turn to an assessment of the interactive process in which the complainant and respondent participated, if any. The investigative tasks which must be completed include, but are not limited to, gathering all documents and interviewing witnesses for the purpose of answering the following questions:

- 1) Determining what efforts(s), if any, respondent made to determine if a reasonable accommodation could be established and implemented.
- 2) What forms of reasonable accommodation were considered and rejected? What reasons do respondent and/or the complainant assert for rejecting those forms of accommodation?
- 3) Did respondent offer any form of accommodation to the complainant? If so, what was the substance of its offer? How was it communicated to the complainant? How many times and on what dates? Was any aspect of respondent offer conditional?
- 4) If the complainant refused the accommodation offered, what was her rationale? Did she request an alternate, specific form of accommodation? If so, what was it? Did respondent respond to that request? If so, what was its response? What rationale did it give?

If analysis of the available relevant evidence demonstrates that no reasonable accommodation could have been devised and implemented that would have allowed Mary to perform the essential functions of the job of Secretary, the case file must be closed because there is insufficient evidence to establish that respondent Widgetmaker violated the FEHA.

If analysis of the available relevant evidence demonstrates that a reasonable accommodation could have been devised and implemented that would have allowed Mary to perform the essential functions of the job of Secretary without endangering her own health or safety, the investigation continues with an assessment of the remedies that will redress respondent's violation of the FEHA. At this point, the complaint has been found to have merit.

#### **d. Remedies**

Once it has been concluded that the evidence adduced is sufficient to establish that a violation of the law occurred, a proper and appropriate remedy must be determined. The formulation of a remedy, whether to facilitate DFEH's conciliation efforts or prepare for litigation, will be based upon the applicable legal standards and particularized facts of the case in question. (A complete discussion is set forth in the Chapter entitled "Remedies.")

There are a number of potential remedies available in the above-discussed hypothetical case of Mary Jones.

For instance, the complainant may be awarded back pay, i.e., the total she would have earned while working for respondent had she been offered the job of Secretary, calculated from the date she would have started work to the date she began working for her current employer. The evidence must show, however, that the complainant made good faith attempts to secure other employment during that time period. In other words, it must be established that she attempted to "mitigate" her losses.

The complainant might also be entitled to a monetary award designed to compensate her for any emotional damage she suffered as a result of being rejected by the respondent for the position of Secretary. No particularized medical, psychiatric or psychological harm must be shown to have been suffered by the complainant, but the FEHA does require that she demonstrate she suffered that type of emotional harm that would ordinarily be experienced by a reasonable person who was subjected to the type of discrimination perpetrated by the respondent.<sup>21</sup>

Once a complaint has been shown to be meritorious, DFEH may insist, as a condition of settlement without litigation or as part of the relief requested from the FEHC or court, that the respondent cease and desist from engaging in similar unlawful conduct in the future. Additionally, DFEH may seek an agreement or order directing the respondent to draft, adopt, implement and disseminate to all of its employees a workplace policy prohibiting discrimination and harassment which fully complies with the FEHA and includes a process by which the respondent's employees may file internal complaints. Moreover, the respondent must agree to provide training outlining the rights and responsibilities set forth in the FEHA to some or all of its employees, depending upon the particularized facts of the case.

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<sup>21</sup> *Vinson v. Superior Court* (1987) 43 Cal.3d 833.

## **2. Example Number Two: Retaliation Based Upon Opposition to Conduct Prohibited by the FEHA**

*The complainant, Eric, was employed as a supervisor for Municipal Utility Company. Over the course of his five-year tenure, he received promotions and raises, and training was provided by his employer leading to certification in his field of expertise. Certification would lead to additional promotional and advancement opportunities.*

*Eric's immediate supervisor, Bruce, terminated one of the six employees that Eric supervised, Don, allegedly for good cause, without first notifying or discussing the situation with Eric. Don then filed an internal complaint with the employer's Equal Employment Opportunity (EEO) officer, claiming that his employment was actually terminated because of his race (Black). He contended that the reasons provided by Bruce for his firing were pretextual.*

*In his complaint, Don listed Eric as a witness. Thus, Eric was interviewed during the employer's internal investigation into Don's allegations and eventually testified supportively at the hearing on Don's grievance. Don prevailed and was reinstated to his employment with full back pay and restoration of all benefits.*

*During the intake interview, Eric tells you his workplace problems began about one week after Don filed his complaint. Bruce called him into his office and showed him the department's new organizational chart. Eric was shocked to see that another employee's name was listed as occupying his supervisory position. A couple of weeks later, Bruce accused him of falsifying his timecard in order to be paid for hours that he did not actually work and warned him that he would lose his alternative work schedule if there were any further "instances" of such conduct. Eric denies engaging in any wrongdoing.*

*A couple of weeks later, Bruce did, in fact, strip Eric of his supervisory responsibilities, claiming that Eric had failed to competently perform his duties. He again accused Eric of submitting fraudulent timecards.*

*Eric decided to apply for a promotional opportunity in a different department with a new supervisor. However, when he appeared for the interview, he found that Bruce was a member of the interviewing panel. Shortly after the interview, Eric testified favorably for Don at the hearing on his grievance. Just three days later, Bruce informed him that he was not selected for the promotion. The employee selected not only had no supervisory experience, he had worked in the specialized field a much shorter time than Eric and completed fewer educational objectives.*

*Eric explains that soon after he filed an internal EEO complaint, he was removed by Bruce from crucial departmental projects and committees, and given menial, repetitive assignments. He was not informed about changes in procedures and policies, and left out of meetings at which such information was given to other employees. Bruce also denied his requests to take additional classes leading to certification. Eric asserts that Bruce's actions made it impossible for him to perform his duties competently and when he asked Bruce for clarification about his assignments, Bruce barked at him, telling him he was being "confrontational" and asking if he was "refusing to complete work assigned to [him]."*

*Eric tells you that his employer has claimed it has been investigating his complaint for many months now. He has neither been advised of the company's investigative findings nor provided with the investigative report he requested. His request for a transfer to a different position where he would be supervised by someone other than Bruce was denied. Eric is still employed, but explains that he is extremely unhappy and suffering from emotional distress coupled with physical symptoms. He is seeking treatment from a psychiatrist for depression.*

**a. Determine if the Complaint is Within DFEH's Jurisdiction**

It must first be established that DFEH has jurisdiction to accept and investigate the complaint.

Does the respondent dispute that DFEH has jurisdiction? If so, it is important to analyze the bases for the respondent's contentions and analyze the arguments carefully to determine whether or not they have any merit.

**1) Procedural Issues/Questions:**

As to all complaints, the applicable statute of limitations must be ascertained and a determination made as to whether the complaint was timely filed. Other required inquiries include, but are not limited to, whether or not the complaint was properly served upon the respondent within the statutory timeframe.

**2) Subject Matter Issues/Questions:**

Is Municipal Utility Company a California employer with five or more employees? Is Respondent Bruce a "person," as that term is used in the FEHA?

Does the complaint encompass conduct and events that constitute violation(s) of the FEHA, Unruh or Ralph Acts? In other words, is

the behavior complained of encompassed by the laws DFEH is empowered to enforce?

May a complaint naming Bruce as a respondent properly be accepted for filing? Yes, because supervisors can be held personally liable for retaliation in violation of the FEHA.

The investigation can only proceed if DFEH has *both* procedural and subject matter jurisdiction over the complaint and parties.

**b. Elements of the Prima Facie Case of Discrimination<sup>22</sup>**

The complaint alleges retaliation for having “opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part.”<sup>23</sup> It is unlawful for an employer to:

demote, suspend, reduce, fail to hire or consider for hire, fail to give equal consideration in making employment decisions, fail to treat impartially in the context of any recommendations for subsequent employment which the employer or other covered entity make, adversely affect working conditions or otherwise deny any employment benefit to an individual because that individual has opposed practices prohibited by the Act or has filed a complaint, testified, assisted or participated in any manner in an investigation, proceeding, or hearing conducted by the Commission or Department of their staffs.<sup>24</sup>

As to this hypothetical case of alleged retaliation, the prima facie elements are:<sup>25</sup>

- 1) The complainant engaged in a protected activity;
- 2) The employer subjected the complainant to adverse employment action;
- 3) There is a causal link or nexus between the protected activity and the employer's action.<sup>26</sup>

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<sup>22</sup> For the sake of brevity, the analytical steps will be discussed only as to Respondent Municipal Utility. However, the same analysis must be completed in order to determine whether the case against Respondent Bruce, named as an individual respondent, may proceed.

<sup>23</sup> Gov. Code, § 12940, subd. (h).

<sup>24</sup> Cal. Code Regs., tit. 2, § 7287.8, subd. (a).

<sup>25</sup> The Analytical Outline contained in the Chapter entitled “Retaliation” should be referenced.

The Explanation of the Analytical Outline details the type of oral and documentary evidence that should be gathered and analyzed as to each element of the prima facie case. Also detailed therein are examples of relevant questions that should be asked and persons who should be interviewed.

**1) Did the complainant engage in a protected activity, i.e., did he/she oppose any practices forbidden under the FEHA or file a complaint, testify or assist in a proceeding such as, for instance, an investigation, hearing or trial?**

**a) Is this element of the prima facie case in dispute?**

Respondent Municipal Utility may dispute one or more elements of the prima facie case or stipulate as to all prima facie elements, but contend that it had a legitimate, nondiscriminatory reason for taking action against Eric.

If Respondent Municipal Utility stipulates that Eric engaged in a protected activity, the investigation may proceed with analysis of the next element of the prima facie case.

If not, as discussed in the Explanation to the Analytical Outline, the investigative tasks that should be completed include, but are not limited to obtaining and reviewing all documents relevant to Eric's participation or cooperation in Respondent Municipal Utility's investigation of and findings pertaining to Don's EEO complaint, as well as any written statements provided in conjunction therewith by Eric, and the transcript(s) of any testimony given by Eric.

**b) Does the evidence gathered demonstrate the existence of this prima facie element?**

If the available relevant evidence does not support a conclusion that Eric engaged in a protected activity, the case must be closed because there can be no prima facie showing that a violation of the FEHA occurred. Stated differently, unless the evidence confirms that Eric engaged in a protected activity, he could not have been subjected to retaliation *because of* a protected activity.

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<sup>26</sup> *Flait v. North American Watch Corp.* (1992) 3 Cal.App.4th 467.



If the available relevant evidence does support a conclusion that Eric engaged in a protected activity, the analysis proceeds.

**2) Did Respondent Municipal Utility subject Eric to an adverse employment action?**

**a) Is this element of the prima facie case in dispute?**

The respondents may stipulate that Eric was subjected to an adverse employment, i.e., demotion. He contends that he was employed in a supervisory capacity for at least several years, but was removed from that position and the job was given to another employee. Additionally, Eric claims that he was denied selection, not given equal consideration by the respondents in making employment decisions, subjected to adverse working conditions, and denied employment benefits such as educational opportunities.

So long as Respondents Municipal Utility and/or Bruce stipulate that Eric was subjected to at least one form of adverse employment action, the investigation may proceed with analysis of the next element of the prima facie case.

Retaliation need not be the sole or substantial factor or reason for the respondents' adverse action. Even if other nondiscriminatory factors also entered into the respondents' decision, the legal standard is still met as long as retaliation was at least one of the factors that motivated the respondent to take the adverse action. The focus of the investigation is on the "totality of the circumstances."

If the respondents dispute the existence of this prima facie element, the investigative tasks that must be completed include, but are not limited to, reviewing all documents related to Eric's claim that he was demoted, including but not limited to payroll records, employee action or change forms, memoranda, correspondence, organizational charts (draft and adopted). Additionally, Eric's claim that he was denied selection may be tested by reviewing his application and resume, as well as those of all other applicants for the position, interview notes, evidence of background checks conducted by Respondent Municipal Utility, etc. As to Eric's claim that he was excluded from meetings and not given information requisite to satisfactorily performing his duties, memoranda, correspondence, minutes and other similar

documents must be reviewed and evaluated. Records substantiating the denial of educational opportunities would include written requests or applications submitted by Eric and Respondent Municipal Utility's response, as well as receipts for payments made to educational providers, class log-in sheets or census data, certifications provided to other employees, etc.

**b) Does the evidence gathered demonstrate the existence of this prima facie element?**

If the available relevant evidence does not support a conclusion that Eric was subjected to an adverse employment action, the case must be closed because there can be no prima facie showing that a violation of the FEHA occurred. Stated differently, unless the evidence confirms that Eric was subjected to at least one form of adverse employment action, he was not subjected to unlawful discrimination.

If the investigation reveals that Eric was subjected to an adverse employment action, the analysis continues with an examination of the third and final prima facie element.

**3) Was there a causal connection (nexus) between the protected activity in which Eric engaged and the adverse action to which he was subjected? In other words, was the adverse action taken against Eric, at least in part, because he engaged in a protected activity?**

**a) Is this element of the prima facie case in dispute?**

In a retaliation case, this element of the prima facie case will be disputed by the respondent(s). The types of evidence which will lead to the conclusion that a causal connection (nexus) existed between the complainant's protected activity and the adverse action to which he/she was subjected include close proximity in time between the two events. The evidence must be evaluated to determine if Eric's allegations and description of the events alleged is factually accurate. Therefore, documents reviewed and witnesses emphasized should stress the respondents' knowledge (actual or constructive) of Eric's protected activity, the amount of time that elapsed between his activity and the adverse action(s) taken against him, and any statements made (orally or in writing) by the respondents which reveal a retaliatory animus toward Eric. For instance, if the evidence reveals that Bruce

told a co-worker, “I’m going to make sure that Eric gets what he deserves for testifying against me at that hearing” not long before he did, in fact, demote Eric, it can be concluded that Bruce was motivated to and did retaliate against Eric.

Evidence that must be gathered and analyzed includes, but is not limited to that described above, as well as identification of the decision-maker(s) who took the adverse action. There may be more than one. For instance, Bruce may have been acting in concert or accordance with instructions from his superior(s). The decision-maker(s) should be interviewed.

See the directly relevant questions set forth in the Analytical Outline accompanying the Chapter entitled “Retaliation.”

**b) Does the evidence gathered demonstrate the existence of this prima facie element?**

If the available relevant evidence does not show the existence of a causal connection between Eric’s protected activity and the adverse action(s) to which he was subjected, the case must be closed because there is insufficient evidence to establish that a violation of the FEHA occurred.

If the evidence gathered establishes the existence of the elements of the prima facie case, the analysis proceeds with a consideration of any legitimate, nondiscriminatory reason(s) asserted by the respondent to justify the adverse action taken against the complainant.

**c. Affirmative Defenses**

In this hypothetical case, Respondent Municipal Utility contends that it was justified in taking adverse action against Eric because of his affirmative misconduct, including his falsification of his timecards, as well as his failure to perform his duties competently.

The respondents will not be found to have engaged in retaliation if they can articulate a legitimate nonretaliatory explanation for their actions which is not merely pretextual. California employers are not prohibited from “enforcing reasonable disciplinary policies and practices, nor from demonstrating that the actions of an applicant or employee were either disruptive or otherwise detrimental to legitimate business interests so as to justify the denial of an employment benefit.”<sup>27</sup>

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<sup>27</sup> Cal. Code Regs., tit. 2, § 7287.8, subd. (b).

The validity of the respondents' assertions must be analyzed with reference to the evidence discussed above, i.e., witness interviews, documents, and consideration of not only the timing of the respondents' actions, but also any direct evidence such as statements demonstrating animus or desire to retaliate, either in writing or oral.

The complainant may also provide evidence that the rationale offered by the respondents for the adverse employment action is merely a pretext for the illegal conduct.

The Explanation of the Analytical Outline details the type of oral and documentary evidence, in addition to that discussed above, that must be gathered and analyzed in order to evaluate the viability of the defense. Also detailed therein are examples of relevant questions that should be asked and persons who should be interviewed.

If the respondent produces sufficient evidence to establish the existence of a legitimate nondiscriminatory reason for the adverse action, and the evidence adduced does not support a finding that the rationale is pretextual, there is insufficient evidence to show that a violation of the FEHA occurred. Thus, the case cannot proceed and the file must be closed.

If analysis of the available relevant evidence demonstrates either that there was no legitimate nondiscriminatory reason for the adverse action taken by the respondent or that the rationale provided by the respondent is merely pretextual, the complaint will be found to have merit. *The evidence need only show that the discriminatory reason for the adverse employment action was one factor in the employment decision. It need not be the sole or even dominant motivating factor in order for the FEHA to have been violated.*

The investigation continues with an assessment of the remedies that will redress the respondent's violation of the FEHA.

#### **d. Remedies**

If the evidence gathered during the investigation establishes that a violation of the law occurred, an appropriate remedy must be determined. The formulation of a remedy, whether to facilitate DFEH's conciliation efforts or prepare for litigation, will be based upon the applicable legal standards and particularized facts of the case in question. (A complete discussion is set forth in the Chapter entitled "Remedies.")

There are a number of potential remedies available in the above-discussed hypothetical case of Eric.

For instance, Eric can be restored to his supervisory position and awarded back pay, i.e., the total he would have earned in that capacity had he not been wrongfully demoted. Additionally, if Eric suffered any loss of benefits, such as payment by his employer of insurance premiums, contributions to a retirement plan, bonuses, reimbursement for educational expenses, etc.

Eric may also be entitled to a monetary award designed to compensate him for the emotional damage and accompanying physical symptoms he suffered as a result of the respondents' conduct. No particularized medical, psychiatric or psychological harm must be shown to have been suffered by a complainant, but the FEHA does require a demonstration that he suffered the type of emotional harm that would ordinarily be experienced by a reasonable person who was subjected to the type of discrimination perpetrated by the respondent.<sup>28</sup>

As explained above, once a complaint has been deemed meritorious, DFEH may insist, as a condition of settlement without litigation or as part of the relief requested from the FEHC or court, that the respondents cease and desist from engaging in similar unlawful conduct in the future. Additionally, DFEH may seek an agreement or order directing Respondent Municipal Utility to draft, adopt, implement and disseminate to all of its employees a workplace policy prohibiting discrimination and harassment which fully complies with the FEHA and includes a process by which the Municipal Utility's employees may file internal complaints. Moreover, Respondent Municipal Utility must agree to provide training outlining the rights and responsibilities set forth in the FEHA to some or all of its employees, depending upon the particularized facts of the case.

Further, if DFEH litigates the case before the FEHC and seeks damages for emotional distress to be paid to the complainant, it may seek the imposition of an administrative fine to be paid to the General Fund of the State of California. In Superior Court, DFEH or complainant may ask the court to award punitive damages if the respondent's conduct was oppressive, malicious or undertaken with a conscious disregard of the complainant's right to work in an environment free from unlawful discrimination and retaliation. Punitive damages are assessed with reference to the net worth of the person or entity that committed the violation.

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<sup>28</sup> *Vinson v. Superior Court* (1987) 43 Cal.3d 833.

Additionally, as a condition of settlement, DFEH may insist that an individual employee or supervisor who engaged in conduct violative of the FEHA participate in individualized counseling or sensitivity training in order to educate the respondent and prevent similar behavior from occurring in the future.

In California, a supervisor may be held personally liable for engaging in retaliation in violation of the FEHA. Therefore, the damages assessed for emotional distress would be payable to the complainant by either Respondent Municipal Utility or Respondent Bruce. Additionally, Respondent Bruce could be found liable for punitive damages by application of the same standard, i.e., a finding of malice, oppression or conscious disregard of the complainants' rights.

### **3. Summary of the Application of the Analytical Framework**

In order to assess whether or not a complaint has merit, i.e., a preponderance of the available, relevant evidence compels a finding that the respondent violated the FEHA, the step-by-step process outlined above should be employed.

- a. Determine whether DFEH has jurisdiction to accept the complaint and proceed with the investigation.
- b. Based upon the precise nature of the allegations, ascertain the elements of the prima facie case of discrimination, harassment or retaliation that must be established in order for a violation of the FEHA to be demonstrated.
- c. Gather and analyze the available, relevant evidence as to each element of the prima facie case. If the existence of any element of the prima facie case cannot be proven by competent evidence, the case must be closed at that juncture and a "right-to-sue" letter issued to the complainant.
- d. After determining that sufficient evidence exists to prove each and every element of the prima facie case, determine whether the respondent asserts that an affirmative defense exists which, if proven, would provide a legal justification for the respondent's actions.

Note, however, that as to some alleged violations of the FEHA, there is no viable affirmative defense. For example, there is no affirmative defense to an allegation of workplace harassment, irrespective of the protected bases asserted.

If the available relevant evidence establishes the viability of at least one affirmative defense, the case must be closed at that juncture and a “right-to-sue” letter issued to the complainant.

If the available relevant evidence establishes that no affirmative defense may be invoked by the respondent to escape liability, a violation of the FEHA is deemed to have occurred, the complaint is considered meritorious, and the investigation proceeds.

- e. Once it has been determined that the available evidence supports a finding that unlawful discrimination, harassment and/or retaliation occurred, the final component of the investigative phase is the formulation of an appropriate remedy.